

CHARLES GREEN, Appellant.

ELIZABETH POOL (*Executrix of*) Respondent.
Sir John Delavall, Bart. deceased }

The Respondent, Mrs. Pool's CASE.

19th December, 1698,
Sir John Delavall's Lease
 of the Collieries to Mr.
Ord in Trust for Mr.
Rogers.

SIR JOHN DELAVALL of *Seaton-Delavall* in the County of *Northumberland*, Bart. deceased, being seized in Fee of the Manors of *Seaton-Delavall* and *Hartley* in the said County of *Northumberland*, and of the Coal-mines and Collieries there, by Indenture Tripartite dated the 19th of *December*, 1698, made between the said *Sir John Delavall* of the first Part, *John Rogers*, Esq; (since deceased) of the second Part, and *John Ord*, Gentleman (since deceased) of the third Part, demised to the said *John Ord* all his the said *Sir John Delavall's* Coal-mines and Collieries within his said Manors and Lands of *Seaton-Delavall* and *Hartley*, to hold to the said *John Ord*, his Executors, &c. from the said 19th of *December*, 1698, for the Term of thirty-one Years. In which Lease there is a Covenant from Mr. *Ord* (the Lessee) to *Sir John Delavall*, his Heirs, &c. in these Words, viz.

“ AND further also, that he the said *John Ord*, his Executors, Administrators “ and Assigns shall and will now, and from time to time hereafter, during the “ Continuance of this present Indenture of Lease, well and truly pay, or cause to “ be paid unto *Henry Green*, and the other Tenants and Farmers of the Lands “ and Grounds within the Manors of *Hartley* and *Seaton-Delavall* aforesaid for the “ time being, such Satisfaction and Recompence for Damage and Spoil of Ground “ done, or hereafter to be done, made, or occasioned by the said *John Ord*, his Executors, Administrators or Assigns, by sinking any new Pit or Pits, laying or “ leading of Coals, and making or using any Way or Ways, Drift or Drifts, or “ doing any other thing touching the Premises, as by the Judgment of two in- “ different Persons shall be thought fit and reasonable; one whereof to be named “ by and on the Part and Behalf of the said *John Ord*, his Executors, Admini- “ strators or Assigns, and the other of them to be named by and on the Behalf “ of the said *Henry Green*, or the said other Tenants, who shall sustain such Da- “ mage and Spoil of Ground.”

Covenant from Lessee
 in the Colliery-Lease to
 make Satisfaction to the
 Tenants of the Lands
 for Damage and Spoil of
 Ground in working the
 Collieries.

Note, THIS Lease was made in Trust for Mr. *Rogers*, a Party named in the Lease, when *Henry Green* (the Appellant's Father) was Tenant from Year to Year of all the Lands within the Manor of *Hartley*, and died so, after whose Death the Appellant entered and continued Tenant until *November*, 1714, when

SIR JOHN DELAVALL, by Indenture of Lease dated the 12th of *November*, 1714, demised to the Appellant, his Executors, &c. all the Messuages, Tenements, Farm-holds, Lands, and Grounds within the said Manor of *Hartley*.

12th November, 1714.
Sir John Delavall's Lease
 of the Lands to the Ap-
 pellant *Green*, with an
 Exception as to the Col-
 lieries.

“ EXCEPT, and always reserved unto the said *Sir John Delavall*, his Heirs, “ Lessees or Assigns, all Mines and Minerals of what kind soever, in and under “ the said Premises, with Liberty from time to time, and at all times during the “ said Term, for him the said *Sir John Delavall*, his Heirs, Lessees or Assigns, to “ dig, sink and make Pit and Pits in the said Premises, and to manage and car- “ ry on the same, and all those already sunk and won, to lead and carry away “ the Coals to be gotten forth and out of the same, and also to make Pit- “ rooms, build Hovels and Lodges, and to lay Waggon-ways, and to repair “ the same; and to do every other Act and Thing convenient and necessary in “ and about the same, be the said *Sir John Delavall*, his Heirs, Lessees, or As- “ signs, paying and allowing such reasonable Satisfaction for Damages and Spoil “ of Ground as is, and are mentioned, and agreed, and set down in the Indentures “ of Lease of the said Coal-mines, granted by the said *Sir John Delavall* to *John Rogers*, Esq; deceased, or some in Trust for him, and under which the said “ Collieries are now held and enjoyed, to hold the same (except as before excepted) “ to the Appellant, his Executors, Administrators and Assigns from *May-day*, “ 1715, for twenty-one Years, yielding and paying the Sum of Three hundred “ twenty-five Pounds Yearly to the said *Sir John Delavall*, his Heirs and Assigns, “ at *May-day* and *Martimus*, by equal Portions.”

AND

AND it was by the said last mentioned Indenture also agreed, that the Appellant, his Executors, &c. should, during the Term, uphold and keep the Roofs and Covers of the Houses belonging to the demised Premises, which were then covered with Thatch, w^{ch} covered and Water-tight, and all the Hedges, Gates and Stiles in good and tenantable Repair; and that Sir *John Delavall*, his Heirs and Assigns, on their Part, should keep in Repair all the Walls and Timber belonging to the Roofs of such Houses.

Soon after the Execution of the said Colliery-Lease, Mr. *Rogers* (for whom Mr. *Ord* was Trustee) entered and wrought the Collieries until the Year 1725, when Mr. *Rogers*, named in the Lease, having been many Years before that time dead, Mr. *Rogers* (his Son) as his Devisee or Administrator, determined the Lease according to a Power therein; and afterwards Sir *John Delavall* enter'd and wrought the Collieries until about the 4th of *June*, 1729, when Sir *John* died, having first made his Will, and the Respondent, Executrix thereof, and residuary Legatee.

AND by the Clause in the Lease of the Lands from Sir *John Delavall* to the Appellant, in which the Coal-mines are excepted, Sir *John Delavall* reserves several Liberties necessary for working the Coal-mines, the said Sir *John*, his Heirs, Lessees and Assigns paying and allowing such reasonable Satisfaction for Spoil of Ground as two indifferent Persons should adjudge, according to the Agreement in the Lease from Sir *John Delavall* to Mr. *Ord*. And the Appellant did for many Years, and until *Michaelmas*, 1708, apply to Mr. *Rogers* (for whom Mr. *Ord* was Trustee) for Satisfaction for Spoil of Ground, and the same was settled between Mr. *Rogers* deceased, or his Agents, and the Appellant, who received such Satisfaction accordingly from Mr. *Rogers*.

THE said Mr. *Rogers*, mentioned in the Lease, dying in *November*, 1709, and Mr. *Rogers* (his Son) continuing to work the Colliery until *Michaelmas*, 1725, the Appellant from time to time applied to him, and his Agents, for Satisfaction for Spoil of Ground; and the said Mr. *Rogers* and the Appellant appointed proper Persons to view and settle the Damages, and the same was valued; but the Persons named could not agree in their Estimates thereof until *Michaelmas*, 1720, when a general Estimate was made from *Michaelmas*, 1708, to that time (*Michaelmas*, 1720) at 130*l.* 10*s.* which the Appellant refused to accept, though Mr. *Rogers* (the Son) was content to pay the same.

MR. *ROGERS* (the Son) was always willing and ready to pay the Appellant what should be settled for Damages, according to Mr. *Ord*'s Covenant; but the Appellant being dissatisfied therewith, applied to Sir *John Delavall*, and, at Sir *John*'s Request, Mr. *Rogers* (the Son) and the Appellant again appointed Persons to make an Estimate, but they could not then agree; yet the Appellant from time to time received Coals of the said Mr. *Rogers*, in all to the Amount of 200*l.* and upwards, on Account of Damages; and Sir *John*, during the Continuance of the Colliery-Lease, never apprehended himself liable to make any Satisfaction whatsoever for Damages or Spoil of Ground, nor did the Appellant *Green* ever demand Satisfaction of Sir *John Delavall*.

SIR *JOHN DELAVALL*, during the time he wrought the Colliery, was always willing to allow the Appellant such Damages as should be thought fit and reasonable, during the time of his working, and two indifferent Persons were appointed for that Purpose, who could not agree, so that the same remained unsettled at Sir *John*'s Death; yet the Appellant received Coals from Sir *John* in his Life-time to the Amount of 20*l.* and upwards, on Account of Damages; but there was but little time, as above-mentioned, *viz.* from *September*, 1725, to the 4th of *June*, 1729, wherein Sir *John* worked the Colliery, it being chiefly in the Hands of Lessees, who, by the Agreement, were to pay for, or allow for such Damages.

Appellant's Bill, Trinity Term, 3^o Georgii II.
Respondent's Answer, 4th March, 1730.

AND the Appellant being half a Year's Rent in Arrear to Sir *John* at his Death, amounting to 162*l.* 10*s.* he (without making any Demand on the Respondent for Damages) immediately after Sir *John*'s Death prefer'd his Bill in the Court of *Exchequer* against the Respondent, for a Discovery of the Assets of Sir *John*, and that the Respondent might come to an Account, and make him Satisfaction not only for Damages for Spoil of Ground, during the time Sir *John Delavall* wrought the Colliery, but also for all the time the same was wrought by Mr. *Rogers*, and for Satisfaction for several Houses (Part of his Farm) which he suggested the said Sir *John* suffered to fall down for want of Reparation in the Walls and Timber: And his Bill also prayed an Injunction to stay the Respondent from proceeding against him at Law for the Rent in Arrear, and for the Coals which he had received from Sir *John Delavall*.

THE Respondent, by her Answer to the said Bill, insisted, That she or Sir *John Delavall*, were not liable to make the Appellant any Satisfaction for Spoil of Ground during the Continuance of the Colliery-Lease to Mr. *Ord*; and that she believed the Appellant either did receive Satisfaction from Mr. *Rogers*, or might have received the same, if his Demands had been reasonable; she admitted Assets of Sir *John Delavall*, and offered to appoint an indifferent Person, if the Appellant would appoint another on his Side, to adjust the Damages during the time which Sir *John* wrought the Colliery, and to pay in Money what should be so adjusted, to prevent further Litigation, or taking any Account thereof, during the time of Sir *John*'s working the Colliery, and insisted, that

that if the Houses became ruinous, it was through the Appellant's own Neglect to repair them in Thatch, and to keep them Water-tight, and hoped she should not be restrained from proceeding at Law.

THE Plaintiff having replied, and the Cause being at Issue, both Parties proceeded to examine Witnesses; whereupon the Respondent proved the several Matters above, with regard to the Appellant's receiving Satisfaction of Mr. *Rogers* deceased, 'till *Michaelmas*, 1708, as also his Application afterwards to Mr. *Rogers* (the Son) and the several Views and Estimates above: And also proved that Mr. *Rogers* (the Son) was willing to have paid what should be adjusted for Damages to *Michaëlas*, 1720, during the Continuance of the Colliery-Lease; and proved the Appellant's Receipt of Coals from Mr. *Rogers* (the Son) to the Amount of 200 *l.* upon the Account of Damages; and also proved, that the Decay in the Houses was occasioned by the Appellant's Neglect in not keeping them covered, and Water-tight, according to his Covenant, whereby the Timber, which supported the Roofs, became rotten, and the Walls fell down, and the Appellant applied the Timber to make Implements of Husbandry, and the Stones to the Reparation of his Fences, contrary to the Covenants of his Lease.

ON HEARING the said Cause, the Council for the Respondent objected, That the Appellant wanted proper Parties; for that he ought to have made Mr. *Rogers* (the Son) and the Executors of Mr. *Ord*, Parties to his Bill; and that the Appellant's Remedy (if any) was at Law; and likewise insisted on several other Matters, as Reasons for dismissing the Appellant's Bill; whereupon, and on hearing the Appellant's Counsel, and upon reading the Colliery-Lease made to Mr. *Ord*, and the Lease of the Lands to the Appellant, the Court did ORDER AND ADJUDGE, *that the Appellant's Bill should be dismissed with Costs.*

AGAINST which Decree, or Order of Dismissal, the Plaintiff *Green* has Appealed:

BUT the Respondent humbly conceives, and is advised, that such Decree is a very right and just Decree, for the following Reasons, amongst others.

First, For that the Appellant had a legal Remedy against Sir *John Delavall*, and against the Respondent, as his Executrix, on his Covenant for Repairing the Walls and Timber which supported the Roofs of the Houses, in case the same had been out of Repair by Sir *John's* Neglect, which the Respondent doth in no sort admit, and therefore the Appellant ought not to have come into a Court of Equity to seek Satisfaction for such Damages.

Secondly, For that the Appellant had the like Remedy against the Respondent for Damages for the Spoil of his Ground, during the time Sir *John Delavall* wrought the Colliery; and both the said Sir *John Delavall* and the Respondent were always ready and willing to make him Satisfaction for the same, to be ascertained by two indifferent Persons, according to the Agreement in the Appellant's Lease, which he has not offered by his Bill, or prayed that the same may be done.

Thirdly, For that by virtue of the said Clause in the Appellant's Lease, he might have recovered Satisfaction against Mr. *Ord*, and his Representatives, for Damages and Spoil of his Ground during all the time the Colliery was wrought under the Lease thereof to Mr. *Ord*: And as Mr. *Rogers*, and his Son, the Cestuique Trusts of Mr. *Ord*, the Lessee, who did those Damages, were answerable for them, so the Appellant made his Election to receive Damages from Mr. *Rogers*, and his Son, and actually received from them a Satisfaction for Part of these Damages, and therefore he ought to have made Mr. *Rogers* (his Son) who with his Father had committed such Spoil, and the Representatives of Mr. *Ord*, who had covenanted to make Satisfaction, Parties to this Suit, whereby the Court might have been able to have decreed from whom the Appellant should receive Satisfaction, the Respondent being answerable only from the time of Sir *John's* Entry.

THE Respondent therefore humbly hopes that the said Decree, or Order of Dismissal, shall be affirmed, and the Appeal dismissed with Costs.

J. WILLES.

THO. LUTWYCHE.

CHARLES GREEN, Appellant,
 ELIZABETH POOL
 (Executrix of Sir John
 Delavall, Bart. deceased) Respondent.

The Respondent's CASE.

To be Heard at the Bar of the House of
 Lords, on Friday the 1st of February,
 1733.

1st Feb^{ry} 1733.

The Order of the Court of Exchequer. ^{Complained of} was reversed
 and ordered, that the Appell^t. be at Exchequer by adding proper Parties,
 paying the Costs of the Day, in the said Court.